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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL M. PARADIES, THE PARADIES SHOPS, INC., PARADIES MIDFIELD CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

The government does not dispute the significance of the questions presented by the petition: whether the federal government has sufficiently clear statutory authority under 18 U.S.C. § 1346 to prosecute virtually all public corruption at the state and local levels; and what constraints exist on the admissibility of co-conspirators' prior consistent statements, which are often the government's most powerful evidence in such prosecutions. On the first question, the government largely ignores the actual language of the statute, seeking support instead in unauthoritative snippets of legislative history and in other appellate decisions that either do not squarely address the question presented here or rely on the same meager legislative history. On the second question, the government misconstrues both the opinion below and our argument. Nowhere does the government come to terms with the conflict that the opinion below creates with the decisions of this Court and other courts of appeals. Nor does the government suggest that the facts of this case make it an inappropriate vehicle for addressing the legal questions presented by the petition.[1]

1. The government has elsewhere emphasized, and does not deny here, the "exceptional importance" of the first question presented by the petition: whether Congress indicated with the requisite clarity that 18 U.S.C. § 1346, the "honest services" amendment to the mail fraud statute, was intended to reach all

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[1] By motion to amend, petitioners also raised a third question: whether 18 U.S.C. § 666, which prohibits corrupt payments to officials of state and local agencies that receive at least $10,000 in federal funds, requires the prosecution to prove that the allegedly corrupt payment would affect federal funds. That same issue is presented in *Salinas v. United States*, *cert. granted*, 65 U.S.L.W. 3505 (Feb. 24, 1997) (No. 96-738), in which certiorari was granted on February 24, 1997. The government acknowledges that, at least as to this issue, the petition should be held pending the decision in *Salinas*.

manner of "dishonesty" involving state and local officials in the conduct of their duties.[2]

The government does not contest that the Eleventh Circuit's construction of § 1346 fundamentally alters the federal-state balance by making a federal crime of conduct that historically has been prosecuted, if at all, only by the states. *See* Pet. at 14. Nor does the government suggest that § 1346, by its terms, satisfies the "plain statement" rule articulated by this Court in *United States v. Bass*, 404 U.S. 336 (1971), and its progeny — a rule that requires Congress to speak clearly and unequivocally if it intends to "render a wide range of conduct violative of federal law" that, as here, "traditionally had been regulated by state law." *Williams v. United States*, 458 U.S. 279, 290 (1982) (citing *United States v. Enmons*, 410 U.S. 396 (1973); *Bass*, 404 U.S. 336).

In *McNally v. United States*, 483 U.S. 350 (1987), this Court applied this "plain statement" rule to a public corruption prosecution much like this one. The Court explained that if Congress intended, through the federal mail fraud statute, to set and enforce "standards of disclosure and good government for local and state officials," it must "speak more clearly than it ha[d]" up to that time. *Id.* at 360; *see id.* at 361 n.9 (refusing to construe existing mail fraud statute to reach otherwise lawful conduct of state and local officials absent "a much clearer indication" of congressional intent).

In the wake of *McNally*, the Department of Justice proposed an amendment to the mail fraud statute that explicitly would have proscribed schemes to deprive the citizenry of the honest services of state and local officials.[3] The Senate adopted the provision,

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[2] Suggestion of the United States for Rehearing *En Banc*, *United States v. Brumley*, 79 F.3d 1430 (5th Cir. 1996).

[3] In introducing this proposal, Acting Assistant Attorney General John Keeney (counsel for the government in this case) explained the Justice Department's view "that any legislative response [to *McNally*] must be

but the House of Representatives did not. Instead, Congress enacted § 1346, a single sentence that contains no expression of intent, much less a clear one, to intrude into what traditionally has been the domain of state and local government.

2. The arguments that the government *does* advance in its opposition do not undercut the need for this Court to review the § 1346 issue in this case. In the face of the undeniable fact that Congress chose not to adopt the Senate alternative to § 1346 that expressly would have reached dishonesty by state and local officials, the government speculates that the House "*may* . . . have found [the Senate language] too narrow in that it *may* have reached only corruption involving public officials, and not schemes to deprive private employers or organizations of their right to honest services by their officials and agents." Opp. at 10 (emphasis added). However, whether or not such speculation as

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carefully tailored to the problems created by *McNally*." *Fraud Amendments Act of 1987: Hearing on H.R. 3089 & H.R. 3050, Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 9 (1988) [hereinafter "House Hearing"]. The Justice Department took the position that a House bill, which (similar to § 1346) would have defined "fraud" to include defrauding another "of intangible rights of any kind whatsoever in any manner for any purpose whatsoever," H.R. 3089 § 2(a), "would not eliminate gaps which exist in current law and which make it difficult for prosecutors to successfully bring public corruption cases." House Hearing, *supra*, at 9.

In contrast, the Justice Department's own legislation, which was designed to "respond[] directly to those concerns expressed by the Supreme Court in *McNally*," "explicitly focused on corruption and dishonest conduct in government at the State and local as well as the Federal levels." *Id.* at 9, 10. Recognizing that "*McNally* was predicated upon the concern that the expansive use of the mail fraud statute resulted in the exercise of federal jurisdiction over conduct not clearly authorized by Congress," the Justice Department asserted that its proposed legislation was necessary to "address both the problems created by *McNally* and be assured that the new statute can withstand judicial scrutiny." *Id.* at 19, 21.

to Congress's motive has any basis in fact, the *Bass* "plain statement" rule remains unsatisfied. The government does not, and cannot, demonstrate that Congress "has in fact faced, and intended to bring into issue," whether to "effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bass*, 404 U.S. at 349.

In a further attempt to justify reading language into § 1346 that Congress declined to put there, the government asserts that unenacted alternative legislation is "'unpersuasive evidence.'" Opp. at 10 (quoting *United States v. Frega*, 933 F. Supp. 1536, 1545 (S.D. Cal. 1996)). But this Court thought otherwise in *Jerome v. United States*, 318 U.S. 101 (1943). In that case, the Court rejected the government's argument that a state law felony could constitute a predicate offense under the federal bank robbery statute. The Court found it significant that, as in this case, a bill proposed by the Justice Department that would have expressly incorporated state law crimes had been adopted by the Senate but rejected in the House. *Id.* at 102-03. The Court reasoned that, because "the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress," any such "expansion of federal criminal jurisdiction should hardly be left to implication and conjecture." *Id.* at 105-06. The same rule should apply to § 1346.

3. In the absence of any support for its position in the statutory text, the government rests its argument on two isolated statements in the legislative history. *See* Opp. at 7-9 & n.2. The government does not even attempt, however, to justify why these statements should be accorded any significant weight. *See Atascadero State Hosp. v. Scalon*, 473 U.S. 234, 242 (1985) (federalism interests protected by plain statement rules require proof of congressional intent "in the language of the statute").

The government relies primarily on a lengthy floor statement by Representative Conyers. The government infers that § 1346 applies to dishonesty involving state and local officials because Representative Conyers, after referring to congressional hearing

testimony that the *McNally* decision had interfered with public corruption prosecutions, stated that "[t]his amendment is intended merely to overturn the *McNally* decision." Opp. at 8 (quoting 134 Cong. Rec. 33,296-33,297 (1988).[4] At most, however, Representative Conyers' remarks indicate that he personally believed that § 1346 would reach dishonesty involving state and local officials. *See Dennis v. Higgins*, 498 U.S. 439, 443 n.4 (1991) (statements of individual legislators cannot overcome plain statement requirement). It would be particularly inappropriate to attribute Representative Conyers' statement to the full Congress given that he voted *against* the final bill, that he did not purport to be presenting anything other than his personal views, and that not even one other member of Congress endorsed, opposed, or expressed any awareness of the statement. Pet. at 12 & n.7.

Similarly, the post-enactment report invoked by the government in a footnote (*see* Opp. at 9 n.2) addressed § 1346 in only three sentences and reflected only Senator Biden's personal views. The report did not purport to present the views of the Senate Judiciary Committee, which never considered either the version of § 1346 that Congress enacted or the report itself. *See United States v. Brumley*, 79 F.3d 1430, 1436, *reh'g en banc granted*, 91 F.3d 676 (5th Cir. 1996). In any event, such "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage"; instead, they "'represent only the personal views of these legislators since the statements were made after passage

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[4] The government does not, however, embrace all of Representative Conyers' statement. In remarks that the government omits from its quotation, Representative Conyers also referred to testimony that *McNally* had interfered with prosecutions of election fraud. 134 Cong. Rec. 33,296-33,297 (1988). Thus, under the government's reasoning here, because § 1346 was enacted to solve the problems created by *McNally*, § 1346 should be construed to reach election fraud as well. But the Department of Justice has for years disavowed any such construction of § 1346. *See, e.g.*, 138 Cong. Rec. S6663, S6666 (May 14, 1992).

of the Act.'" *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974) (quoting *National Woodwork Mfr. Ass'n v. NLRB*, 386 U.S. 612, 639 n.34 (1967)); *accord Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring).

4. The government finally asserts that many circuits have endorsed the expansive construction of § 1346 adopted by the Eleventh Circuit in this case. Opp. at 10-11. Many of the cases cited by the government do not, however, even involve public corruption prosecutions under § 1346.[5] None of them addressed whether, in light of the "plain statement" rule of *Bass* and its progeny, § 1346 may be construed to reach dishonesty involving state and local officials. The only appellate panel to focus on that question concluded that the statute could not be so construed. *See Brumley*, 79 F.3d 1430 (§ 1346 cannot properly be construed to reach dishonesty involving state and local officials).

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[5] Six of the cases do not involve public officials at all, and thus could not have "definitively addressed" whether § 1346 reaches public corruption. *United States v. Catalfo*, 64 F.3d 1070, 1072-76 (7th Cir. 1995) (options trading scam at Chicago Board of Trade), *cert. denied*, 116 S. Ct. 1683 (1996); *United States v. DeFries*, 43 F.3d 707, 708 (D.C. Cir. 1995) (labor union vote fraud); *United States v. Thomas*, 32 F.3d 418, 419 (9th Cir. 1994) (fruit broker secretly averaging prices); *United States v. Holley*, 23 F.3d 902, 905-07 (5th Cir.) (savings and loan shenanigans), *cert. denied*, 513 U.S. 1043 (1994); *United States v. Ames Sintering Co.*, 927 F.2d 232, 233-34 (6th Cir. 1990) (rigging of bid to private company); *United States v. Martinez*, 905 F.2d 709, 710-11 (3d Cir.) (fraud to procure medical license), *cert. denied*, 498 U.S. 1017 (1990). Moreover, in eight of the cases, the defendant was not even charged under § 1346, again making it impossible for those courts definitively to address § 1346's scope. *Catalfo*, 64 F.3d at 1072; *DeFries*, 43 F.3d at 708; *Thomas*, 32 F.3d at 419; *Holley*, 23 F.3d at 907; *United States v. Dischner*, 974 F.2d 1502, 1506 (9th Cir. 1992), *cert. denied*, 507 U.S. 923 (1993); *Ames Sintering Co.*, 927 F.2d at 234; *United States v. Granberry*, 908 F.2d 278, 279 (8th Cir. 1990), *cert. denied*, 500 U.S. 921 (1991); *Martinez*, 905 F.2d at 11-12.

Moreover, as the government acknowledges, this Court granted certiorari and subsequently reversed in *McNally*, even though "every court of appeals that had addressed the issue had held that the mail and wire fraud statutes reached public corruption." Opp. at 6. The number of appellate decisions applying § 1346 only confirms that the question presented here, like the similar question in *McNally* itself, is one of "exceptional importance" and that no purpose would be served by allowing it to percolate in the circuits any longer.

5. As for the second issue raised in the petition, the government ignores our two legal arguments regarding the admissibility of the so-called "Echols tapes" — tape-recorded statements of the government's principal witness, Harold Echols, made after he began to cooperate with the government. The government thus does not dispute that a split exists among the courts of appeals over the admissibility, for rehabilitative purposes, of a prior consistent statement made after the witness had a motive to lie. *See* Pet. at 17-19. Nor does the government dispute that the circuits are also divided over the circumstances in which a court of appeals may affirm the admission of evidence on a ground narrower than that relied on by the trial court. *See* Pet. at 23-25. The government likewise does not deny the importance of either issue.

Instead, the government argues only that we have "misconstrue[d] the basis for the court of appeals' decision upholding the admission of the tapes." Opp. at 11. The government notes that the court of appeals concluded that the tapes were not, as the district court had held,[6] admissible for their

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[6] The government confuses the issue by suggesting (Opp. at 13) that the tapes were not offered at trial for their truth. The trial court squarely held that the tapes were admissible under Rule 801(d)(1)(B), "thereby permitting their introduction as substantive evidence." Order, *United States v. Jackson*, No. 1:93-cr-310 (Apr. 15, 1994), at 33. The court of appeals recognized that "[t]he district court found that the tapes were admissible under Fed.R. Evid. 801(d)(1)(B)." Pet. at 43a.

truth; rather, the tapes were admissible only for certain more limited purposes, such as "to corroborate Echols' testimony on direct examination that he routinely made . . . bribes to [public officials]." Opp. at 13.

The government's argument misses the point. We never suggested that the court of appeals held the Echols tapes to be admissible as substantive evidence. Nor could the court have done so consistent with *Tome v. United States*, 115 S. Ct. 696 (1995). Our argument is that the court of appeals acted erroneously, and contrary to other circuits, in affirming the admission of the tapes even for these limited purposes.

First, the court of appeals erred because, under the common-law relevance rule, a witness's prior consistent statements, if made after he had a motive to lie, are not admissible to "rehabilitate" him. *See Tome*, 115 S. Ct. at 700. That is because such "post-motive" statements are not considered reliable evidence of the witness's truthfulness. A number of circuits have held that this common-law relevance rule survived the promulgation of the Federal Rules of Evidence. *See* Pet. at 18-19 (citing cases). If that is so, then the Echols tapes were inadmissible, hearsay or not. The common-law relevance rule would preclude the admission of the tapes "to rehabilitate Echols," as the court of appeals put it (Pet. at 44a) — or, similarly, as the government puts it here, to "corroborate" his testimony after his credibility was challenged on cross-examination (Opp. at 13).

Second, the court of appeals also erred in holding that the trial court's erroneous admission of the tapes did not require reversal of Mr. Paradies' conviction, so long as the trial court could properly have admitted the tapes for some more limited purpose (*e.g.*, rehabilitation). In order to sustain a conviction in these circumstances, the court was also required to assess whether Mr. Paradies was prejudiced by the erroneous admission of the tapes for all purposes at trial, rather than only for the limited purposes sanctioned on appeal. This sort of assessment clearly is required

by *Shepard v. United States*, 290 U.S. 96 (1933), and its progeny. *See* Pet. at 23-25.

It cannot be assumed that, as the government asserts (Opp. at 16 n.7), Mr. Paradies was not prejudiced by the jury's erroneous consideration of the tapes for their substance, without any limiting instruction. The tapes include, for example, a statement to the effect that Mr. Paradies had exercised his Fifth Amendment privilege not to testify before the grand jury. Pet. App. at 42a. That statement alone presents a strong case for a finding that the introduction of the tapes was prejudicial.[7]

6. The government has not opposed our motion to amend the petition to add a third question: whether 18 U.S.C. § 666 requires the government to prove that a bribe to a public official implicates federal funds. As the government acknowledges (Opp. at 16-17), this question is currently pending before this Court in *Salinas v. United States*, *cert. granted*, 65 U.S.L.W. 3505 (Feb. 24, 1997) (No. 96-738). We agree that the Court appropriately may hold this petition pending its decision in *Salinas*.

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[7] The trial transcript flatly contradicts the government's assertion, moreover, that "nothing that was said or done during the tapes implicated Paradies in the illegal payments." Opp. at 16. For example, in a transcript of a telephone conversation that the government read to the jury, Mr. Echols stated that Mr. Paradies "was supposed to help me out" with a $5,000 payment to a public official. Tr. 2279.

While the government notes that we have focused on certain of these statements only in this Court (*see* Opp. at 14 n.5), the government does not argue that we waived our right to do so. Nor would any such argument be justified. The statements do not constitute a legal claim or an assertion of error; instead, they are factual support for our argument, raised at all stages of the case, that admission of the tapes was erroneous and prejudicial.

CONCLUSION

The petition for a writ of certiorari should be granted as to the first two questions presented. As to the question presented by the motion to amend the petition, the Court should hold the petition pending its decision in *Salinas v. United States*, No. 96-738.

Respectfully submitted,

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